No. 10-1491

IN THE

Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND
ON BEHALF OF HER LATE HUSBAND, ET AL.,
Petitioners,

v.

ROYAL DUTCH PETROLEUM CO.,
SHELL TRANSPORT AND TRADING COMPANY PLC,
SHELL PETROLEUM DEVELOPMENT CO.
OF NIGERIA, LTD.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF NUREMBERG HISTORIANS AND INTERNATIONAL LAWYERS IN SUPPORT OF NEITHER PARTY

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BRIEF AMICI CURIAE OF NUREMBERG HISTORIANS AND INTERNATIONAL LAWYERS IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICI CURIAE

Amici curiae are academic specialists on the Nuremberg trials and post-World War II legal practice and diplomatic and economic history. They have an important interest in this case, which raises the issue of whether the Nuremberg and related postwar trials demonstrate the existence of an international norm of corporate criminal liability.[1] Amici include:

Jonathan A. Bush, lecturer at Columbia Law School and author of *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremburg Really* Said, 109 COLUM.L.REV. 1094 (2009) ("Bush, *Prehistory of Corporations*"), cited in *Sarei v. Rio Tinto, PLC*, F.3d , 2011 WL 5041927, *20 (9th Cir. Oct. 25, 2011) (en banc); *id.* at *45 (McKeown, J., concurring in part and dissenting in part); and in *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 52 n.42 (D.C. Cir. 2011); *id.* at 8384 (Kavanaugh, J., dissenting in part).

Peter F. Hayes, is Professor of History, Chair of the Department, and the Theodore Zev Weiss Holocaust Educational Foundation Professor of Holocaust Studies at Northwestern University. He has written

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[1] This brief has been filed with the written consent of the parties, which is on file with the Clerk of Court. Pursuant to Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amici or their counsel, make a monetary contribution to the preparation or submission of this brief.

two histories of German corporations and Nazism: INDUSTRY AND IDEOLOGY: I.G. FARBEN IN THE NAZI ERA (1987, 2001) and FROM COOPERATION TO COMPLICITY: DEGUSSA IN THE THIRD REICH (2004), co-edited THE OXFORD HANDBOOK OF HOLOCAUST STUDIES (2011), and served since 2006 by appointment of the German Foreign Minister as the sole American member of the Independent Historians Commission on the German Foreign Office and Nazism.

Harold James, Professor of History at Princeton, Professor of International Affairs in the Woodrow Wilson School, and a leading scholar of modern German history. His books include a study of the interwar depression in Germany, THE GERMAN SLUMP (1986); an analysis of the changing character of national identity in Germany, A GERMAN IDENTITY 1770-1990 (1989); INTERNATIONAL MONETARY COOPERATION SINCE BRETTON WOODS (1996); and FAMILY CAPITALISM: WENDELS, HANIELS AND FALCKS (2006). He was also coauthor of a history of Deutsche Bank (1995), which won the Financial Times Global Business Book Award in 1996, and he wrote THE DEUTSCHE BANK AND THE NAZI ECONOMIC WAR AGAINST THE JEWS (2001).

Peter Maguire, who has taught the laws of war at Columbia University and Bard College, and the author of LAW AND WAR (2001), an account of Nuremberg and the American tradition of war crimes trials.

Detlev F. Vagts, Bemis Professor of International Law, Emeritus, at Harvard Law School, and the author of numerous works on private and public law, including TRANSNATIONAL BUSINESS PROBLEMS (4th

ed. 2008) (co-author with William S. Dodge & Harold Hongju Koh), and *Litigating the Nazi Labor Claims; The Path Not Taken*, 43 HARV. INT'L L.J. 503 (2002) (co-author with Peter L. Murray).

Gerhard L. Weinberg, the William Rand Kenan, Jr. Professor Emeritus of History at the University of North Carolina, editor of a reprint of the 42-volume Nuremberg trial record, and the author of THE FOREIGN POLICY OF HITLER'S GERMANY (1970 and 1980; republished 1994), which received the George Louis Beer Prize of the American Historical Association in 1971; WORLD IN THE BALANCE: BEHIND THE SCENES OF WORLD WAR II (1981); A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II (1994); and VISIONS OF VICTORY: THE HOPES OF EIGHT WORLD WAR II LEADERS (2005).

Amici respectfully submit this brief to provide a context for assessing Nuremberg and other postwar trials and to correct misimpressions in other briefs filed in this case purporting to show that Nuremberg supports corporate ATS liability. Amici take no side and have no stake in the present litigation, and therefore submit this as a Brief Supporting Neither Party. Amici have accepted neither payment nor expenses. Their motive in presenting the following views is entirely that of legal-historical accuracy. Amici take no position on the overall legality, prudence, or desirability of ATS suits against corporations, or of other human rights instruments or lawsuits. Nor do they address the implications of Nuremberg for other issues.

SUMMARY OF ARGUMENT

Six decades after they ended, the Nuremberg trials are history's best known, most important international trials. In this case, both sides and other amici have discussed the implications of Nuremberg for corporate liability under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"). Amici are concerned that both sides of the debate present Nuremberg mistakenly. Those who support corporate defendants occasionally over-read the evidence, taking the fact that no corporate entities were in fact charged at Nuremberg as if it proved a settled rule that corporations and similar business entities could not be charged.

Most ATS briefs err on the other side, however, by arguing that the Nuremberg trials embodied a growing norm of corporate accountability. In this case, plaintiffs address Nuremberg in their Opening Brief ("Petrs. Br."), at 48-52. In addition, a number of Nuremberg scholars have submitted an amicus brief in support of certiorari ("Br. of Nuremberg Scholars in Support of Cert.") and presumably will file a similar one in support of plaintiffs on the merits.

However, these briefs misread the historical evidence. They ignore the ways in which Nuremberg judges ruled for business defendants on the facts – however mistakenly, according to most modern historians – or with lenient views of the law, or found business defendants guilty but only on the narrowest of reasons. More ambitious plans for addressing economic perpetrators were rejected by U.S. occupation authorities, their superiors in the War or State

Departments in Washington or the Allied Control Council in Berlin, the other three allied governments, or the Germans themselves. Plaintiffs and their amici also give short shrift to the brevity of sentences given the industrialists convicted at Nuremberg, their speedy commutations, the restitution of forfeited assets, the lifting of other restrictions placed upon their companies, and the prompt and continuing repudiation of Nuremberg in German law.

Further, plaintiffs and their amici do not correctly characterize Control Council Law No. 9, issued on November 30, 1945, which directed the dissolution of I.G. Farben, a German chemical industry conglomerate and the largest cartel in Europe. Law No. 9 was adopted not to punish Germany for human rights abuses, of which the Allies were then only dimly aware, but as part of a program to disarm Germany. It was a political determination – an exercise of warmaking powers – not a judicial or legal decision that could give rise to the kind of norm on which plaintiffs rely.

In short, the Nuremberg and related postwar trials do not demonstrate the existence of a 1940s international norm of corporate criminal liability that might serve as precedent in ATS suits against business corporations today. The claim that Nuremberg provides a source of ATS corporate liability does not rest on legal history.

ARGUMENT

Amici address three discrete issues:

First, did prosecutors and judges at Nuremberg and other postwar trials address corporations as such and, if so, was the decision to address or bypass corporations made on the basis of a norm of corporate liability?

Second, did the Allies' assertion of jurisdiction over organizations and the charges in the first Nuremberg trial (1945-46) against six political, security, and military organizations give rise to a norm also applicable to business entities?

Third, trials aside, did the treatment of German businesses in the four Allied occupation zones, including the seizure or breakup of some firms and the ouster of Nazi personnel, imply a norm of corporate liability?

Amici conclude that, overall, no corporate liability norm was identified by Nuremberg and related trials or grew from those trials.

I. CORPORATIONS AT NUREMBERG AND OTHER POSTWAR TRIALS

As a matter of history the record shows that no corporations were tried either directly or indirectly at Nuremberg, for reasons both legal and prudential; that Nuremberg proceeded on the basis of individual liability for putatively criminal acts, not corporations' collective liability; and that even the cases against individual industrialists largely failed to deliver their goal of legal accountability.

A. CORPORATE LIABILITY WAS NOT CONSIDERED IN THE FIRST, INTERNATIONAL NUREMBERG TRIAL

Neither natural nor legal persons from the private sector were tried at the first Nuremberg trial (1945-46), the four-power "International Military Tribunal" ("IMT"). The sole business defendant named in the indictment, Gustav Krupp, was chosen because of the notoriety of his family-owned arms empire, but only after miscommunication between chief American prosecutor Justice Robert Jackson and his British counterpart, Attorney-General Sir Hartley Shawcross. With so many candidates for inclusion in a first trial, Jackson favored indicting several industrialists, but the two chiefs settled on one business figure, neglecting to specify whether their agreement on "Krupp" meant Gustav Krupp, who led the firm till 1943, or his son Alfried, who assumed control thereafter; then they agreed on the father without investigating whether he was physically able to be tried, which the judges ruled he was not. Telford Taylor, THE ANATOMY OF THE NUREMBERG TRIALS 89-94, 115, 150-61 (1992); Hartley Shawcross, LIFE SENTENCE 101-02 (1995) ("Shawcross, LIFE SENTENCE"). Soon after, the head of the American economic case, Assistant Attorney General Francis Shea, was eased out of his job, Taylor, ANATOMY, 141-43, and not replaced. As a result, there was no private-sector economic defendant of any sort in the trial.

No corporations were charged, and careful review of documentary evidence in two dozen archives suggests that corporate criminal liability

appears not to have been discussed. In the end, even the leading public-sector economic defendant, former Reichsbank President and Economics Minister Hjalmar Schacht, was acquitted, with the court providing reasons that made future international cases against economic actors extremely difficult. *United States v. Goering (The Nurnberg Trial)*, 22 TRIALS OF THE MAJOR WAR CRIMINALS ("TMWC") at 411, 552-56 (Intl Mil. Trib. 1946); Bush, *Prehistory of Corporations*, at 1161; Cecelia H. Goetz, *Critical Perspectives on the Nuremberg Trials*, 12 N.Y.L.S. J. HUM. RTS. 515, 520 (1996) ("Goetz, *Critical Perspectives*").

Hence, the first Nuremberg trial lends no support to a supposed norm of international criminal liability for corporations.

B. CORPORATE LIABILITY AND THE PROPOSED SECOND INTERNATIONAL TRIAL

Soon after the judges ruled that Krupp senior was incapable of being tried, Allied negotiators began to discuss the possibility of a second international trial chiefly or exclusively to try economic actors. In the end, proposals for a second multinational trial went nowhere, largely a victim of strong British Foreign Office hostility, Jackson's skepticism, and reluctance at the highest American levels to cooperate again in a prosecution with the Soviets. Telford Taylor, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, 22-27 (1949) ("Taylor, FINAL REPORT"); Donald Bloxham, GENOCIDE ON TRIAL: WAR CRIMES TRIALS

AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY 24-30 (2001) ("Bloxham, GENOCIDE"); Bush, *Prehistory of Corporations*, at 1112-17, 1123-29.

Three points are pertinent for business liability. First, amidst all the mountains of evidence, not one document has emerged suggesting that anyone in any department in any of the four Allied negotiating powers suggested charging corporate entities, even in a program that was intended to focus on business offenders. Second, there were a tiny number of proposed natural-person defendants – most estimates spoke of a half dozen defendants in what would have been the second and last international trial. Third, in every list of defendants, it was assumed that the prosecuting powers would want to try the same small number of persons.

Taken together, the absence of any mention of corporations as defendants, the short lists of targeted individuals, and the implausibility of corporate trials anywhere else are a thin reed on which to rest a general international norm against corporate criminality.

C. INTERNATIONAL CORPORATE LIABILITY IN LATER NUREMBERG TRIALS

While negotiations for a second international trial were continuing, an American team led by General Telford Taylor began to prepare cases for presentation to U.S. tribunals either in addition to or instead of an international trial. Taylor's office ultimately charged 185 defendants in twelve trials (1946-49), and four of the trials involved individual

defendants (not corporations) from private businesses. No corporations were charged or tried, and the most recent student of the topic has termed the effort to find in these trials a precedent for corporate liability "misguided." Kevin Jon Heller, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 253 (2011).

Yet the key moment for business liability may have been not the four cases, but rather the planning from early summer 1946 to mid-winter 1947 that preceded the filing of the first of the four. From the start, prosecutors' focus had been on economic cases, and their challenge was to frame usable, legitimate theories on which to base charges. Taylor, FINAL REPORT at 39; Bloxham, GENOCIDE at 38; Bush, *Prehistory of Corporations* at 1131. And here, in this planning period, for the only time in the entire Nuremberg program is there direct evidence that the notion of corporate criminality was raised. The author was Abraham L. Pomerantz, Taylor's senior deputy in charge of economic cases. In at least one memorandum from this period, he proposed the idea of charging corporations for the mass atrocities in which they participated. *Id.* at 1149-57, 1247-48. It was one of many proposals that the creative Pomerantz offered, and it was not adopted. A few months later Pomerantz went home, though for reasons that appear unrelated to the failure to file charges against corporations. *Id.* at 1171-72, 1197. Over the course of spring 1947, charges were filed against forty-odd individuals from the Flick, Farben, and Krupp firms, and in autumn a final case was filed against a top executive from the Dresdner Bank and three from the giant state-owned Hermann Goering

Works. There was also a case against Oswald Pohl and 17 other leaders of WVHA, the sprawling SS economic empire that produced a huge range of items but whose major "product" by the end of the war was slave labor, which it leased to private industry and agriculture, though all parties to the Pohl case conceived of the defendants as government and security officials, not private businessmen. That was the extent of the Nuremberg program of trying the offenses of big business.

To be sure, there is no mention to be found in any archives wherein anyone at Nuremberg objected to the Pomerantz proposal. However, there are weighty considerations against inferring a norm of corporate liability from it, including the fact that Pomerantz's proposal was not adopted in any of the four American trials, though it might have been fleetingly mentioned in connection with the Dresdner Bank. *Id.* at 1199-1200. In fact, corporate liability was neither supported nor assessed by anyone else on a staff of well over a hundred articulate lawyers who circulated memos in multiple copies on nearly every topic.

One Nuremberg panel did permit a lawyer to speak on behalf of a corporation "from a moral point of view," and then referred a few times to the possibility of guilt for "private individuals or juristic persons," United States v. Krauch ("the Farben case"), 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS ("TWC") 1132 (1948), but the phrase was entirely in dicta: the same court made a few references to Farben's guilt, Petrs. Br. 50 n. 45, but promptly said that the issue was immaterial as

no corporations were charged. 8 TWC 1153 ("the corporate defendant, Farben, is not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings...."). The court then walked away from its own dicta by stressing that corporations act only through individuals, and concluded by characterizing both the firm and its managers and directors in an astonishingly friendly light in the teeth of all evidence. *Id.* at 1136-53.

Today, human rights scholars often praise the four Nuremberg trials charging individual economic actors, and they are right to point to the vigorous and skillful American prosecution efforts. But the cases were failures in the conventional legal sense. In three of the four cases, most of the judges looked with sympathy on the defendants, and in all four they adopted legal rulings and factual findings that led to acquittals, under-convictions, and light sentences. The judges displayed indifference and sometimes hostility to the prosecution's evidence and seemed to disbelieve that the German business leaders before them could possibly have been complicit in mass atrocities. In the *Farben* case, the judges largely ignored the prosecution's evidence especially regarding the firm's involvement with Auschwitz, convicting only those defendants whose personal presence at the camp was conceded and acquitting everyone on charges of involvement with poison gas, even though to this day some courts and ATS supporters misstate these acquittals as convictions. *In re Agent Orange Prod. Liab. Litig.*, 373 F.Supp. 2d 7, 98 (E.D.N.Y. 2005); George P. Fletcher, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 164 (2008). If further proof were needed of the real outcome of these cases,

one might look at the consistent disappointment voiced afterward by prosecutors and at least one judge, Josiah E. DuBois, Jr., THE DEVIL'S CHEMISTS (1952); Benjamin B. Ferencz, LESS THAN SLAVES (1979); Goetz, *Critical Perspectives* at 516, 520, 522-25; Shawcross, LIFE SENTENCE 132-33 (citing his own and Jackson's views); Taylor, ANATOMY 94, 630; Taylor, FINAL REPORT 187, 196-200; WILLIAM J. WILKINS, THE SWORD AND THE GAVEL 217-21 (1981); ORAL HISTORY INTERVIEW WITH WILLIAM ZECK AND BELLE ZECK, U.S. Holocaust Memorial Museum Oral History Collection, Sept 12, 1996, RG-50.030 at 54, 68-70, 78-82, 93.

D. NON-NUREMBERG TRIALS AGAINST ECONOMIC ACTORS

If Nuremberg provides surprisingly little support for business liability, other postwar trial programs offer even less. The British did not want to try any business perpetrators, Bloxham, GENOCIDE at 34-41; Bush, *Prehistory of Corporations* at 1127-28, 1189-92, 1226-27; Shawcross, LIFE SENTENCE at 131, and a careful review of their internal deliberations has disclosed not one single reference to legal corporate responsibility, criminal or civil. In the only other British case germane to economic actors, a military court tried Bruno Tesch, a key supplier of Zyklon B to Auschwitz, along with two of his colleagues.

But Tesch is a weak reed on which to rest a general norm of corporate liability. Bloxham, GENOCIDE at 75-76; Bush, *Prehistory of Corporations* at 1226 n. 504. As a military trial, it relied entirely on the traditional "laws and customs of war," meaning the war crime of murdering Allied citizens (by poison gas),

rather than new Nuremberg law, which would have included crimes against humanity against anyone regardless of nationality. As a military tribunal, the court neither issued a written decision, nor was it interested in conducting broad fact-finding into giant corporate actors like Degussa and IG Farben (Tesch's senior partners via the Degesch firm); indeed, British military law had no precedent for a tribunal to hear corporate charges. In short, Tesch was an unambitious case resting on a narrow jurisdictional base.

Nor were there more than a tiny handful of economic trials elsewhere. The same major four Allies, along with seven other nations in the Pacific Rim, had agreed to an International Tribunal for the Far East ("Tokyo Tribunal") to try major Japanese war criminals, a tribunal that was modeled on and legally the counterpart of the first Nuremberg trial. This tribunal neither had jurisdiction over corporations nor tried any individual businessmen for economic offenses. Back in the European theater, the Soviets did not try corporations as such. In all likelihood, this unexpected result was due not to a lessened hostility to private property and corporations in general, but because the state intended to seize German corporations for reparations. The French eventually conducted a single Nuremberg-style case of their own against the leadership of the Roechling firm, which had been involved in the expropriation of French assets in the Saar basin, 14 TWC 1061 (1949), but that was the extent of their legal efforts in this area.

As for Nuremberg, the crucial fact may be not that modern theories can be wrung from its handful of cases, but that those four trials, along with Tesch and Roechling, represent such a diminution of postwar plans. In 1945-46, hundreds of German companies and thousands of individuals had been under review, at least at the level of investigators and staff prosecutors. Bush, *Prehistory of Corporations* at 1131-35. Many German businessmen feared that they might be charged and their companies seized or broken up, and not a few individuals were in fact detained and screened, S. Jonathan Wiesen, WEST GERMAN INDUSTRY AND THE CHALLENGE OF THE NAZI PAST, 1945-1955, at 47, 69 (2001). In the end, none of those corporations were tried, and very few of the individuals. From the private sector, leading figures from Krupp, Flick, Farben, and Dresdner, but no others; from the public economic sector, three leaders from HGW, but nobody from state-owned giants like Volkswagen, Heinkel, Junkers, Kontinentale Oel, or Brabag.

One reason for this was the Cold War, and another was trial fatigue. But a third, forgotten reason was the hope that Germany would bring major cases. The complete failure of German authorities to do so, especially in the economic area, is strong evidence against any putative postwar norm of corporate accountability.

As early as 1946, the Allies allowed denazified German courts to try cases with jurisdiction that included crimes against humanity, Devin O. Pendas, THE FRANKFURT AUSCHWITZ TRIAL, 1963-1965, at 12-13 (2006) ("AUSCHWITZ"). After 1950, newly auto-

nomous West German courts reverted to traditional penal law. Neither was used for trials of economic perpetrators. In 1946-50, of the thousands of cases charging crimes against humanity, only a few dozen even involved homicide, *id.*, and only one (Peters, *infra*) concerned economic acts. Later, West German courts tried thousands of Nazi-related cases, all available in English and searchable by offense. Justiz und NS-Verbrechen, at http://www1.jur.uva.nl/junsv/brd/Dienstengfr.htm (West Germany); http://www1.jur.uva.nl/junsv/ddr/DDRDienststellenengfr.htm (East Germany). Dozens of cases initially appear to involve economic acts, but they concerned not industrialists or companies but guards who beat to death slave laborers. There were a few cases against public-sector perpetrators whose crimes might be characterized as economic, such as the indictment (dropped) of Albert Ganzenmüller, State Secretary of the Reichsbahn. 3 Raul Hilberg, THE DESTRUCTION OF THE EUROPEAN JEWS 1168 (3d ed. 2003) ("DESTRUCTION"). East German lawyers sought to participate in the West German case against Auschwitz personnel to refocus it against I.G. Farben, but failed. Pendas, AUSCHWITZ at 151-56.

In the end, the only germane cases for economic acts were the West German trials of Gerhard Peters, head of the Degesch firm that co-distributed Zyklon B to Auschwitz whose guilt equaled that of Tesch. Peter Hayes, FROM COOPERATION TO COMPLICITY: DEGUSSA IN THE THIRD REICH 298-99 (2004). Charged with a dossier that Nuremberg prosecutors had helped prepare, Peters was tried and convicted

twice and given a third trial, at which the court acquitted. *Id.*; 3 Hilberg, DESTRUCTION at 1168; Bush, *Prehistory of Corporations* at 1233-34. This dearth of major trials and especially economic cases comes as no surprise. It was noted at the time and has been explored by dozens of recent historians. East Germany, built on rhetoric of anti-fascism and anti-capitalism, might have wanted to try businessmen if it had any to try, while West German leaders felt solidarity with figures from traditional elites like big business who had participated in Nazi crimes. Almost all Nuremberg and other defendants were soon released, but the first to be freed in full were the industrialists. They were welcomed and restored to leading positions, and almost unanimously refused to consider paying restitution. Ferencz, LESS THAN SLAVES. And in German legal theory, they had no need to do so. The near-unanimous West German view was that Nuremberg had been illegitimate. Lawyers and foreign ministry officials worked to ensure that the treaties restoring sovereignty to West Germany, while stating that Germany would not repudiate occupation judgments, included clauses that negated the validity of Nuremberg within Germany, and the highest constitutional court twice affirmed that invalidity, Peter Maguire, LAW AND WAR 236-39 (2000); Jörg Friedrich, *Nuremberg and the Germans*, in War CRIMES: THE LEGACY OF NUREMBERG 87, 98-105 (Belinda Cooper ed., 1999). Despite the primacy of international law under the Basic Law (Article 25), German law held that domestic law could not punish industrialists for acts that were legal under the Nazis, and international Nuremberg norms were invalid. In short, corporate or individual liability for

economic violations of the sort alleged in ATS suits was minimized to the vanishing point, which explains why plaintiffs and their amici can point to only a half dozen ambiguous cases.

True, thousands of German economic actors – plant managers, division chiefs, directors, and the like – were removed briefly from their positions in the so-called denazification proceedings (discussed below in Part III), but the shared motive for the program in all four zones was as much political as legal, the hearings were administrative more than legal, and the program itself was soon ended amidst bitter German protests and widespread ridicule.

In sum, the treatment of corporations at Nuremberg and other postwar trials does not demonstrate an international norm of corporate criminal liability.

II. CORPORATE LIABILITY AND NUREMBERG'S THEORY OF "ORGANIZATIONS"

The Nuremberg scholars supporting plaintiffs have offered a second, separate Nuremberg argument for corporate liability based on the London Charter creating the International Military Tribunal. Br. of Nuremberg Scholars in Support of Cert. at 8-10. They say that entirely aside from the direct matter of corporations and economic perpetrators, the London Charter provided for charges against "organizations," Charter of the International Military Tribunal, August 8, 1945, Art. 9-10, repr. in Taylor, FINAL REPORT at 238, that business corporations are a form of legal organizations, and that therefore even if Nuremberg trials did not charge

corporations, they allowed and implied corporate liability.

This argument is wrong for three reasons. First, the evidence makes clear that at every step, the term "organizations" was meant to include government agencies and security and party formations only. Second, the London Charter provided different consequences for guilty organizations and individuals. Third, the governance of business corporations by Allied occupation authorities, even when those companies were dissolved, was dictated not by judicial verdicts but by political, military, and economic issues. The first two of these considerations will be discussed here, and the third in part III below.

A. The Limited Meaning of "Organizations"

In 1944-45, Allied planners did not think for a moment that the organizations likely to face charges, such as the Nazi Party or Gestapo, might remotely be innocent, or that if found innocent for whatever reason, that they might be revived, or for that matter that their subsequent fate would in any way hinge on the outcome of a trial. On the contrary, the entire goal of the war was to crush the Nazi regime and its institutional levers, and decisions in furtherance of that goal would be made by political leaders and military commanders, not judges.

With victory achieved, the Allies soon issued a broad law listing over 60 types of Nazi Party and government organizations (including all six soon tried at Nuremberg), that were destroyed and banned, with their property confiscated. *See* Law No. 2 (Oct 10, 1945), at I.131 (entire series available

at the Library of Congress, http://www.loc.gov/rr/frd/Military_Law/enactments-home.html (last accessed Oct. 10, 2011)), building on Proclamation No. 2 (Sept. 20, 1945), at I.81. The six entities on trial at Nuremberg thus could not have been further punished even if convicted. The point of a declaration of guilt was not to punish an extinguished entity, but rather to facilitate later trials of its members, by establishing the facts res judicata and creating a presumptive evidentiary record.

Thus, the April 30, 1945, American draft proposal submitted to the Allies in San Francisco spoke of finding the extent of participation for the accused organizations. REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON 1945, at 30 (1949) ("Jackson, REPORT"). The London Charter (Aug. 8, 1945) spoke not of verdicts, but of declarations of criminality for accused organizations. Charter, Art. 9, 59 Stat. 1544, 82 U.N.T.S. 279. Organizations were not "tried" in the usual sense at Nuremberg, and they could not have been punished at all, that issue having been decided elsewhere.

"Organizations" were meant to include party, government, and security formations, nothing more, and not business entities, as prosecutors' illustrations show. *See, e.g.*, THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, 1944-1945, at 36, 162, 173 (Bradley F. Smith ed., 1982); Jackson, REPORT at 29, 72. Perhaps the best illustration comes from the reports of Franz Neumann, the famed German-Jewish emigré scholar who worked for the wartime Office of Strategic Services and fol-

lowed its chief, General William Donovan to work for Jackson in the summer and fall of 1945. Franz Neumann, *Indictment of Organizations*, (Sept. 14, 1945), in Donovan Nuremberg Trial Collections, vol. xx, sec. 62.02, Cornell University Law Library, http://library2.lawschool.cornell.edu/ donovan/show.asp (last accessed Oct. 10, 2011). Neumann was the last person to be insensitive to the central role of German business in Nazi criminality, for his groundbreaking book had described business as one of the key components of the Nazi regime, almost an equal to the Party itself. Neumann, BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM 221-369, 385-98 (1944). Yet despite this, Neumann shared the widespread view of officials that the organization charge was meant not for business, but for governmental and party entities with voluntary members. This view formed the basis for the legal theory negotiated and adopted at Nuremberg. Jackson, "Report to the President of the United States" (June 7, 1945), in Jackson, THE NÜRNBERG CASE 9 (1947); Taylor, ANATOMY at 103-05.

Only twice, to amici's knowledge, were business entities associated with organizational guilt. One, the prosecution of the Munich Re insurance firm for falsifying information, is more an occupation offense rather than an international crime, Gerald D. Feldman, ALLIANZ AND THE GERMAN INSURANCE BUSINESS, 1933-1945 492-93 (2001), even if its underlying facts relate to the Holocaust. The other example turns out to support the inference that the theory was intended solely for party, security, and government formations. Not long before the dissolution of

the four-power Allied Control Council, it issued a law ordering the dissolution and forfeiture of certain guilty organizations, listing dozens of insurance companies. But the Council explained that these companies were all Nazi-front, -controlled, or -affiliated entities, and that they were being treated in effect as extensions of the regime. Law No. 57 (Aug. 30, 1947), at VIII.1. As if to underscore the distinction between party/government organizations, including these front insurance companies, and legitimate business activities, the Council provided for the protection of German investors and insured parties. If this represented punishment of a business organization, the "stakeholders" likely never knew it.

B. ORGANIZATIONS AT THE FIRST NUREMBERG TRIAL

By early September 1945, Allied planners had agreed on a list of organizations to be charged, and it was the familiar list of notorious party, security, and governmental agencies – each with members who might all potentially be guilty: the SS, the SD and Gestapo, the SA, the Reich Cabinet, the Leadership Corp of the Nazi Party. At the last minute, Justice Jackson by all accounts surprised his staff and the Allies by demanding that the General Staff and High Command of the German military ("GSHC") be added to the list of indicted organizations, and the Allies with varying degrees of resentment acceded. Taylor, ANATOMY at 104. The inclusion of the GSHC in no way alters the current ATS argument, for the GSHC was also a government, security-related formation with members all of whom might potentially be triable. But for contemporaries, the inclusion of this

new organizational defendant highlighted and converged with a huge practical problem. Millions of men from the German army were prisoners, and even limiting the question to its command and senior staff, it consisted of large numbers. How could this vast number of "members" be handled?

As the months passed in autumn 1945, the appetite for harsh punishment waned. Commanders saw that it was costly to hold and feed millions of prisoners, that detention would be difficult to staff as American military personnel were demobilized, and that regardless of their past histories few Germans posed ongoing threats. Taylor, ANATOMY at 236-43. In Nuremberg, defense counsel first challenged the military "organization" case in December 1945, and the judges demanded answers of the prosecutors, who assigned Jackson to be their spokesman on this uniquely American contribution. Taylor, ANATOMY at 272-88, 302-03; Taylor, FINAL REPORT at 16-17; Bush, *Prehistory of Corporations* at 1143-48 Two sets of urgent discussions ensued, among prosecution chiefs at Nuremberg and between Jackson and authorities in the War Department and occupation government. The result for the military was that commanders were authorized gradually to release POWs, aside from suspects and witnesses needed for war crimes trials, and that for civilians, procedures were modified to permit the millions of detained and suspect persons to be screened by the denazification programs set up in each occupation zone.

The result for Nuremberg, however, was a court ruling on March 12, 1946, that findings of guilt against an organization would not be a "short-cut"

for the conviction of its members and that prosecutors would be required to make an independent showing of each member's acts and intent. Bush, *Prehistory of Corporations* at 1145-46. For war crimes law, organizational theory was eviscerated, since it offered almost no res judicata effect in later trials. In the end, the organizational theory, which never applied to business entities anyway, failed to offer much to anyone in any later cases, either.

C. ORGANIZATION THEORY IN LATER WAR CRIMES TRIALS

At the conclusion of the IMT, the SS, the SD and Gestapo (together), and the Nazi Party Leadership Corps, three of the six accused organizations, were declared to have been criminal. The declarations did not address business entities or activities, nor did they punish the three organizations, since all had been dissolved and their assets confiscated. That was, however, not the end of the matter. Telford Taylor, the new American chief prosecutor, focused on major perpetrators from the SS, and his investigators soon learned that other potential defendants from other Nazi institutions had been given SS rank and membership. Taking what little advantage they could from the IMT organizational rulings, Taylor's staff systematically included membership counts in the indictments of any defendant who had been a senior member of the SS or, in a few instances, of the SD or the Leadership Corps. Yet membership was a tiny part of each case. Defendants in the Pohl case, for instance, charged with running the SS economic empire naturally focused their efforts on rebutting (unsuccessfully) charges connected to death camps

and genocide, not on the self-evident fact that they had been knowing members of the SS.

Some Nuremberg defendants accused of membership were acquitted; for most, a membership conviction meant an additional few years added to their sentence, or was merged into a longer sentence for graver charges, Bush, *Prehistory of Corporations* at 1147-48. Another ten or so defendants were acquitted of all other charges but convicted of criminal membership in the SS, meaning that a few senior Nazis were given short prison sentences when they otherwise would have gone free. United States v. Brandt, 2 TWC 253, 299; United States v. Altstoetter (the Justice case), 3 TWC 1170-77, 1201; United States v. Greifelt (the RuSHA case), 5 TWC 156-58, 163-64; United States v. Weizsaecker (the Ministries case), 14 TWC 856, 865. Nowhere were organizational charges intended for any but party, security service, and government officials, as even a leading defense lawyer saw. Carl Haensel, DAS ORGANISATIONSVERBRECHEN: NÜRNBERGER BETRACHTUNGEN ZUM KONTROLLRATSGESETZ Nr. 10 (1947). Granted, in two cases a business perpetrator, Flick's associate Otto Steinbrinck and Dresdner Banker Karl Rasche, were found guilty of membership, but both for membership in the SS, not in a culpable business organization, and in both cases the sentences for membership and other counts were so light that the men were released well before the accelerated clemency programs began in January 1951. That was the puny result of the "organization" theory: typically it tacked a few months onto a short sentence, and had nothing to do with economic entities or actors.

III. CORPORATIONS AND PUNISHMENT UNDER ALLIED GOVERNANCE

A. ALLIED OCCUPATION AND CORPORATIONS

Plaintiffs argue that the governance of German business corporations during the four years of the Allied occupation also supports a norm of international corporate liability. Plaintiffs claim that the ouster of business managers and directors from certain companies, the forfeiture of some firms' property and production capacity in whole or part, the breakup of one leading company, and the application in a few cases of the corporate "death penalty," dissolution, together demonstrate the Allied view that business corporations could be subject to sanctions. Petrs. Br. 51-52. The Nuremberg scholars supporting plaintiffs point to the "dissolution of corporations and the seizure of their assets . . . even before the first Nuremberg trial began" as proof that "punishment of German corporations under international law took place outside of the courtroom." Br. of Nuremberg Scholars in Support of Cert. at 3.

Amici believe that such claims are mistaken, and the isolated examples on which they are based are misleading. When hostilities ended, the Allies sought to impose a lasting peace through an occupation that embodied shared goals of denazification, demilitarization, democratization, decartelization, decentralization (the so-called "de-program"), as well as reparation. These goals necessarily had adverse consequences for German companies. Yet the history was far more complicated than one of systematic legal accountability for a culpable sector of Germany.

At differing times and for a variety of reasons, occupation officials permitted, protected, and even nurtured business output and companies. For purposes of the present legal question, in order to identify in this complex history a norm of liability, its proponents would need to demonstrate: (i) consistent adverse treatment of German business, (ii) administered with an intent to punish, (iii) based on wrongdoing, (iv) that violated specifically legal standards. None of these four propositions can be shown.

At the outset, it must be stipulated that almost any generalization about this period has to be offered tentatively and then qualified and amended, because there was no single occupation policy regarding business interests or economic institutions or goals or how to achieve them. The four conquering Allies were equal sovereigns, each government pursuing its own, frequently divergent economic policies in its zone of occupation. The British, skittering from one debt crisis to the next and still rationing food at home, strained to import food into their zone and were keen to rebuild German production instead of closing war-production facilities and transferring plants as reparations. The Americans were most thorough in establishing a program of denazification that soon had so many people, often the wrong people, in its net that it had to be radically overhauled. The Soviets were most unyielding on taking the promised reparations both from their zone and the industrialized western zones, while the French wanted reparations in both labor and goods and were most averse to encouraging German exports. Nor was there a policy consensus within any single occupation zone; competing military com-

mands and departmental missions and bureaucratic infighting ensured that. Moreover, in all four zones policy evolved over time as the occupation matured and as the Cold War grew chillier.

Nevertheless, a few overlapping generalizations can be established. First, each of the four occupying governments had complex and evolving aims toward the German economy and business interests, policy aims that went well beyond criminal or civil liability for involvement with the war, the war economy, or atrocities, and often seemed to ignore liability altogether. The claim that punishment of war crimes was one of three leading aims of the occupation, Br. of Nuremberg Scholars in Support of Cert. at 4, holds water only with regard to its very early phases and even then for only some figures in the respective occupation administrations. Second, even where policies adversely affected particular business interests, they were almost always reached and applied as a result of political considerations, not legal, with culpability and the desirability of civil or criminal penalty rarely factors.

With so many authorities involved and divergent goals, the administration of the German economy resembled a patchwork, and examples of almost any type of treatment, and of inconsistencies, could easily be given. Production was encouraged, but plants were dismantled or destroyed. Personnel was purged and sometimes briefly detained, while in other instances even managers associated with notorious activities were hired and protected. Thousands of firms and plants were investigated by agencies in each of the four powers, from the U.S. alone includ-

ing the OSS, war crimes investigators, officials from finance, decartelization, counter-intelligence, and even the Strategic Bombing Survey.

The results of Allied economic planning were diffuse, and were motivated largely by evolving arguments about the desirable framework for economic competition (analogous to US antitrust law). The major banks in the western zones were broken into regional units, but were quickly allowed to merge into zone-wide institutions, and eventually in 1957 into nation-wide entities. Law 27 of the Allied High Commission, titled "Reorganization of the German Coal and Iron and Steel Industries" (May 16, 1950), started with a declaration that the commission's policy was to "decentralize the German economy for the purpose of eliminating excessive concentrations of economic power and preventing the development of a war potential." But the preamble also stated that "the question of the eventual ownership of the coal and iron and steel industries should be left to the determination of a representative, freely elected German government." Alfried Krupp was not only given back the factories and fortune that Nuremberg judges had seized as ill-gotten fruits of international crime, but was quietly allowed to re-enter the arms industry.

Naturally, publicly owned or controlled enterprises also had to be addressed, since their parent agencies or ministries were defunct, and so the state-owned Hermann Goering Works was dissolved. But the German railroad network was never touched or broken up, despite its deep complicity in the implementation of death camps, an involvement that

awakened the belated interest of German prosecutors in the late 1960s. Raul Hilberg, *German Railroads/Jewish Souls*, SOCIETY 14:1 (1976): 60-74, repr. in SOCIETY 35.2 (1998), at 162-74.

Yet many large and most small firms seem to have faced no special legal consequences and were largely untouched. Already by spring 1946, many officials in the American military government concluded that business interests and activities were being given an easy time, or, as many in the popular press put it, Secretary Henry Morgenthau's ideas were discredited, and old-fashioned New Deal concepts of decartelization had lost out to the views of General William Draper, Clay's aide in charge of the economy, who favored speedy German economic reconstruction. Lucius D. Clay, DECISION IN GERMANY 330-32 (1950) (candidly describing staff and policy disagreements). In all this, politics, security concerns, and economics drove policy, and the role of criminal or civil norms for corporate behavior was vanishingly small.

Sitting atop the multiplicity of administrative and governing bodies was the Allied Control Council, consisting of the four commanders-in-chief or military governors or their deputies, a body authorized to issue rules governing all four zones. A thorough review of the laws and decrees of this body shows almost nothing remotely like a norm of civil or criminal culpability for corporations or other business entities. Control Council's Law No. 10 authorized the twelve American Nuremberg trials and a handful of others, but as discussed previously, those trials did not articulate a norm of corporate liability. Law

No. 9 (discussed below) did address one company, I.G. Farben, but again, not on criminal or civil legal grounds. Law No. 57 (discussed above) addressed certain insurance companies, but only by subsuming them to party formations. Directive No. 38 cited industrialists among many others in setting out an exhaustive list of classes of persons to be arrested or detained, but gave no directives addressing business perpetrators. (Oct. 12, 1946), at V.12.

This is not to say that business entities and activities were not covered by various laws in other ways, for they were, as part of larger problems of the manufacture or retention or future capacity to make or hold war materiel and related resources. To that extent, business was thoroughly addressed by the Control Council, but for political and security reasons only, and the authority was not law, but Potsdam agreement or principles of peace and democracy. *See, e.g.*, Law No. 5 (Oct. 30, 1945), I.176; and Directives 24 (Jan 12, 1946), II.16; 39 (Oct 2, 1946), V.1; and 57 (Jan. 15, 1948), IX.3.

Under these and other decrees, business actors were responsible for having been dangerous and for potentially posing future political and military threats, not for violating legal norms or committing crimes. In this respect, the laws and directives addressing business, including IG Farben (discussed below) and war resources are consistent with other Control Council laws addressing other dangerous entities. Law No. 2 (Oct. 10, 1945), I.131, dissolved the Nazi Party and dozens of its subordinate formations and entities; Directive No. 18 (Nov. 12, 1945), I.188 and Law No. 34 (Aug. 2, 1946), IV.63, dissolved

the German armed forces; and Law No. 46 (Feb. 25, 1947), VI.28, dissolved the state of Prussia, notorious outside of Germany for its military caste and ethos.

All these directives cited reasons of security and similar political reasons, and none of them was remotely "legal" or "judicial" in character. They announced no norms of future civil or criminal liability. Indeed, the directives went beyond any ordinary notion of regular law, calling for the ouster and even internment of persons above a certain Party, government, or military rank, persons adhering to Prussian or Junker ethos, large landowners, and relatives of such persons, as well as the removal from other countries to Germany of persons suspected of nonadherence to peace or "obnoxious Germans," by which the commanders meant not mass extradition of war criminals back to Germany (where most were anyway), but the return of Fifth Columnists. *See, e.g.*, Directive No. 24 (Jan. 12, 1946), at II.16; Directive No. 58 (Feb. 5, 1948), IX.8. In all this, there was nothing defining or specially targeting business leaders, much less corporations, and no legal norms or proceedings, only politics.

B. THE SPECIAL PROBLEM OF IG FARBEN

This was the context for Control Council Law No. 9 (Nov. 30, 1945), I.225, providing for the breakup of I.G. Farben and the seizure and dispersal of its property. Plaintiffs and their amici argue that Law No. 9 provides what the Farben case at Nuremberg fails to offer, namely, crucial support for a legal norm of corporate liability. Petrs. Br. at 50-52; Br. of Nuremberg Scholars in Support of Cert. at 12-16.

The reality, however, is that the dissolution was, like the other rulings of the Control Council, political rather than legal in character, and therefore offers little evidence of a norm. The choice of I.G. Farben as target and the decision to dissolve were not legally weighed and determined, but had been contemplated through the war in the U.S., Bush, *Prehistory of Corporations* at 1114 n. 51, and probably elsewhere. I.G. Farben was quite unlike the corporations that are named as defendants in contemporary ATS litigation. Farben was deeply involved in the German war effort, collaborated closely with Nazi officials, and had been the subject before and during the war of U.S. investigations, congressional hearings, Alien Property seizures, and criminal proceedings, essentially all aimed at the cartel's transactions, assets, subsidiaries, and espionage in America. In short, Farben was seen as very dangerous to the Allied powers.

Moreover, the Farben dissolution was not based on legal criteria. There were no hearings, fact-findings, or evidentiary record. Rather, it was an executive decision agreed by the four commanders acting with sovereign power in Berlin, worried about German cartels and warmaking capacity. Nor was the dissolution dependent on the outcome of a criminal trial, since that trial did not begin for another eighteen months and was not remotely agreed upon. Conversely, when a few years later the trial of the firm's leaders ended unsatisfactorily, there was no Allied talk of reviving the Farben entity – not because it was too late to do so, but because the Law No. 9 dissolution had never been based on criminal standards or findings.

Law No. 9 was reached and justified on the basis of a political determination, part of the Allies' war-making powers, that the firm had made dangerous war materiel and been a critical part of the Nazi war effort, and was therefore undesirable and dangerous to the Allies. Its complicity with crimes against humanity or Auschwitz slave labor or poison gas was only being pieced together in November 1945, but more important it was irrelevant to the decision to dissolve. In short, the dissolution of Farben was unlike the judicial proceedings against business defendants at Nuremberg, and instead was similar to the disposition of the Party and military, the other large institutions that were the subject of Control Council proceedings in the same period early in the occupation. It relied on and created no legal norms.

In fact, the dissolution of Farben was not only political, it also was less significant than the disbanding of the party and the military. The Nazi Party formations and the armed forces were dissolved and truly given the corporate "death penalty." In contrast, Farben was not obliterated, but merely broken up. Its plants were seized, personnel screened and briefly purged, and production frozen or diverted for reparations, but these and similar steps were taken against most large companies in the first years of occupation. Among the many plans for the dissolution of Farben, Clay favored one that intended the breakup of the US zone properties alone into 52 independent successor firms. Clay, DECISION at 327.

Very quickly, however, the dissolution so confidently announced in Law No. 9 and the notion of

small successors were forgotten, Peter Hayes, INDUSTRY AND IDEOLOGY: I.G. FARBEN IN THE NAZI ERA 378 (1987), and three huge successor firms emerged (BASF, Hoechst, and Bayer), even though years of negotiations about the details remained, Harold Zink, THE UNITED STATES IN GERMANY, 1944-1955, at 266-67 (1957), along with a largely empty corporate shell which nursed impossible claims to property in Poland and paid pitifully small restitution payments to Jewish slave laborers. Hayes, INDUSTRY at 378; Ferencz, LESS THAN SLAVES at 33-67. The three successors continued to do business throughout the occupation and after. They were permitted to trade with each other and with their former partners and subsidiaries including Degesch, the firm at the center of Zyklon B production. Hayes, COOPERATION TO COMPLICITY at 299-300. They paid Farben's shareholders the face value of the portions of its capital that each successor took over, so that the seizure and dissolution of Farben actually involved no financial penalty to its owners. Raymond Stokes, DIVIDE AND PROSPER 189 (1988).

The successor firms also saw to it that employees of the former Farben, including those imprisoned at Nuremberg, were given pensions or new employment, Stephan H. Lindner, INSIDE I.G. FARBEN: HOECHST DURING THE THIRD REICH 350-65 (Helen Schoop trans., 2008). Eventually, Interhandel, a Swiss-based Farben holding company that claimed those assets of the former Farben empire found in the U.S. and seized during the war as enemy assets, was given its property by Attorney General Robert Kennedy, Joseph Borkin, THE CRIME AND PUNISHMENT OF I.G. FARBEN 211-22 (1978), over the dissent

of Holocaust survivors, whose legal challenge was tossed out by a court puzzled by this first major Holocaust lawsuit. *Kelberine v. Societe International, Interhandel*, 363 F.2d 989 (D.C. Cir. 1966), though even that was not the end of the Farben saga. Surveying this, many would find incomprehensible the claim that Farben was adversely affected at all, much less punished for violation of criminal norms.

What was unique about Farben's legal disposition was not its breakup or the political reasons for it, but the fact that unlike other dissolved firms, it remained dissolved. Flick and Krupp were soon restored to their empires, and the Tesch firm was not broken up but seized and ordered liquidated by the British. As for the hundreds of firms whose leaders were not charged but were investigated or managed by Allied trustees, almost all were soon back in business. Even other cartels that were broken up on economic rather than security grounds were allowed to reunite. Thus, Governor Clay thought the breakup of the big six banks to be very important, even more than the dissolution of Farben, Clay, DECISION at 327-28, but they too were soon allowed to reunite. Like Farben's initial dissolution, its failure to reunite stemmed from politics and economics rather than criminal law. Most likely the successor firms remembered the disadvantages of Farben's cumbersome size and notoriety abroad. It is unlikely that the successors' failure to re-unite was due to any notion of criminal guilt or a long forgotten occupation edict.

Hence, Law No. 9 was a political determination – an exercise of occupation powers – not a judicial or

legal decision that could give rise to the kind of norm on which plaintiffs rely. It was enacted not to punish Farben for its human rights violations, of which the Allies were as yet only dimly conscious, but as a piece of the program to disarm Germany. Further, the determination was not based on any judicial findings rendered in a civil or criminal proceeding.

CONCLUSION

The Nuremberg and related postwar trials do not demonstrate the existence of a 1940s international norm of corporate criminal liability that might serve as precedent in ATS suits against corporations.

Respectfully submitted.

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